

Attorneys for Complainant

In the Matter of

Respondent.


(Government Code Sections 11506
and 11520)

1 Government Code section 11506 provides that failure of a respondent to file a Notice of Defense
2 within fifteen days after being served with an Accusation shall constitute a waiver of respondent's right
3 to a hearing on the merits of the Accusation. The Statement to Respondent, served on Respondent,
4 explicitly stated that a Notice of Defense must be filed in order to request a hearing. Respondent failed
5 to file a Notice of Defense within fifteen days of being served with an Accusation.

6 Government Code Section 11520 provides that, if the respondent fails to file a Notice of
7 Defense, the Commission may take action, by way of a default, based upon the respondent's express
8 admissions or upon other evidence, and that affidavits may be used as evidence without any notice to the
9 respondent.

10 Respondent Michelle Berman violated the Political Reform Act as described in Exhibit 1, which
11 are attached hereto and incorporated by reference as though fully set forth herein. Exhibit 1 is a true and
12 accurate summary of the law and evidence in this matter. This Default Decision and Order is submitted
13 to the Commission to obtain a final disposition of this matter.

14
15 Dated: 10/29/10

16 
17 Roman G. Porter
18 Executive Director
19 Fair Political Practices Commission
20
21
22
23
24
25
26
27
28

ORDER

The Commission issues this Default Decision and Order and imposes an administrative penalty of \$15,000 (Fifteen Thousand Dollars) upon Respondent Michelle Berman, payable to the "General Fund of the State of California."

IT IS SO ORDERED, effective upon execution below by the Chairman of the Fair Political Practices Commission at Sacramento, California.

Dated: Nov 15, 2012



Dan Schnur, Chairman
Fair Political Practices Commission

EXHIBIT 1

INTRODUCTION

Respondent Michelle Berman ("Respondent") was a campaign volunteer in Cotati City Council Member John Guardino's November 7, 2006 campaign. John Guardino was a candidate for Cotati City Council in the November 7, 2006 election. The controlled committee for John Guardino's November 7, 2006 campaign was Friends of John Guardino ("Committee"). In this matter, Respondent accepted a \$1,000 cash contribution on behalf of the Committee, split this contribution into three separate contributions, gave the money to three individuals and instructed these individuals to make a contribution of this amount on their own behalf to the Committee.

This matter arose out of a pro-active investigation by the Fair Political Practices Commission ("Commission"). This matter relates to Commission case numbers 09/739, 09/774, 10/116, 10/117, and 10/505.

For the purposes of this Default, Decision and Order, Respondent's violations of the Political Reform Act (the "Act")¹ are stated as follows:

COUNT 1: On or about September 4, 2006, Respondent Michelle Berman caused a contribution from George Barich to be made by Adrienne Lauby such that the identity of the donor was not reported, in violation of Sections 84301 and 84302 of the Government Code.

COUNT 2: On or about September 4, 2006, Respondent Michelle Berman caused a contribution from George Barich to be made by Robin Birdfeather such that the identity of the donor was not reported, in violation of Sections 84301 and 84302 of the Government Code.

COUNT 3: On or about September 4, 2006, Respondent Michelle Berman caused a contribution from George Barich to be made by Tim Foley, such that the identity of the donor was not reported, in violation of Sections 84301 and 84302 of the Government Code.

PROCEDURAL HISTORY

When the Fair Political Practices Commission (the "Commission") determines that there is probable cause for believing that the Act has been violated, it may hold a hearing to determine

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

if a violation has occurred. (Section 83116.) Notice of the hearing, and the hearing itself, must be conducted in accordance with the Administrative Procedure Act (the "APA").² (Section 83116.) A hearing to determine whether the Act has been violated is initiated by the filing of an accusation, which shall be a concise written statement of the charges specifying the statutes and rules which the respondent is alleged to have violated. (Section 11503.)

Included among the rights afforded a respondent under the APA, is the right to file the Notice of Defense with the Commission within 15 days after service of the accusation, by which the respondent may (1) request a hearing, (2) object to the accusation's form or substance or to the adverse effects of complying with the accusation, (3) admit the accusation in whole or in part, or (4) present new matter by way of a defense. (Section 11506, subd. (a)(1)-(6).)

The APA provides that a respondent's failure to file a Notice of Defense within 15 days after service of an accusation constitutes a waiver of the respondent's right to a hearing. (Section 11506, subd. (c).) Moreover, when a respondent fails to file a Notice of Defense, the Commission may take action based on the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without any notice to the respondent. (Section 11520, subd. (a).)

A. Initiation of the Administrative Action

Section 91000.5 provides that "[t]he service of the probable cause hearing notice, as required by Section 83115.5, upon the person alleged to have violated this title shall constitute the commencement of the administrative action." (Section 91000.5, subd. (a).) Section 83115.5 provides in pertinent part:

No finding of probable cause to believe this title has been violated shall be made by the Commission unless, at least 21 days prior to the Commission's consideration of the alleged violation, the person alleged to have violated this title is notified of the violation by service of process or registered mail with return receipt requested Notice to the alleged violator shall be deemed made on the date of service, the date the registered mail receipt is signed, or if the registered mail receipt is not signed, the date returned by the post office.

Section 91000.5 provides that no administrative action pursuant to Chapter 3 of the Act, alleging a violation of any of the provisions of the Act, shall be commenced more than five years after the date on which the violation occurred. In accordance with Sections 83115.5 and 91000.5, the Enforcement Division initiated the administrative action against Respondent in this matter by serving her with a Report in Support of a Finding of Probable Cause (the "Probable Cause Report") on July 12, 2010. (See Certification of Records ("Certification") filed herewith, Exhibit A, and incorporated herein by reference.)³ The Probable Cause Report was served by

² The Administrative Procedure Act is contained in Government Code Sections 11370 through 11529.

³ On June 15, 2010, the Enforcement Division was informed that the Respondent had retained counsel. All documents herein were served on the Respondent through her attorney.

certified mail. (See Certification, Exhibit A - 1.) Therefore, the administrative action commenced on July 12, 2010, the date Respondent was served the Probable Cause Report, and the five year statute of limitations was effectively tolled on this date. (Sections 83115.5; 91000.5.)

As required by Section 83115.5, the packet served on Respondent contained the cover letter to the Probable Cause Report, advising that Respondent had 21 days in which to request a probable cause conference and/or to file a written response to the Probable Cause Report. (See Certification, Exhibit A - 2.) Respondent neither requested a probable cause conference nor submitted a written response to the Probable Cause Report.

B. Ex Parte Request for a Finding of Probable Cause

Since Respondent failed to request a probable cause conference or submit a written response to the Probable Cause Report by the statutory deadline, the Enforcement Division submitted an Ex Parte Request for a Finding of Probable Cause and an Order that an Accusation be Prepared and Served to Executive Director Roman G. Porter. (See Certification, Exhibit A - 3.) Respondent was sent copies of these documents via U.S. Mail.

On August 11, 2010, Executive Director Roman G. Porter issued an Order Finding Probable Cause. (Certification, Exhibit A - 4.)

C. The Issuance and Service of the Accusation

Under the Act, if the Executive Director makes a finding of probable cause, he or she must prepare an accusation pursuant to Section 11503 of the APA, and have it served on the subject of the probable cause finding. (Regulation 18361.4, subd. (e).) Section 11503 provides:

A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Section 11505, subdivision (a) requires that, upon the filing of the accusation, the agency shall: 1) serve a copy thereof on the respondent as provided in Section 11505, subdivision (c); 2) include a post card or other form entitled Notice of Defense which, when signed by or on behalf

of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506; 3) include (i) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon the respondent of the accusation, and that failure to do so will constitute a waiver of the respondent's right to a hearing, and (ii) copies of Sections 11507.5, 11507.6, and 11507.7.

Section 11505, subdivision (b) set forth the language required in the accompanying statement to the respondent.

Section 11505, subdivision (c) provides that the Accusation and accompanying information may be sent to the respondent by any means selected by the agency, but that no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent has been served personally or by registered mail as set forth in Section 11505.

On August 11, 2010, the Executive Director issued an Accusation against the Respondent in this matter. In accordance with Section 11505, the Accusation and accompanying information, consisting of a Statement to Respondent, two copies of a Notice of Defense Form, copies of Government Code Sections 11506 through 11508, were personally served on Respondent through her attorney on August 30, 2010. (See Certification, Exhibit A - 5.)

Along with the Accusation, the Enforcement Division personally served Respondent with a "Statement to Respondent" which notified her that she could request a hearing on the merits and warned that, unless a Notice of Defense was filed within fifteen days of service of the Accusation, she would be deemed to have waived the right to a hearing. Respondent did not file a Notice of Defense within the statutory time period.

As a result, on October 19, 2010, Commission Counsel Bridgette Castillo sent a letter to Respondent advising that this matter would be submitted for a Default Decision and Order at the Commission's public meeting scheduled for November 12, 2010. A copy of the Default Decision and Order, and this accompanying Exhibit 1 with attachments, was included with the letter. (See Certification, Exhibit A - 6.)

SUMMARY OF THE LAW

An express purpose of the Act, as set forth in Section 81002, subdivision (a), is to ensure that receipts and expenditures in election campaigns are fully and truthfully disclosed, so that voters may be fully informed, and improper practices may be inhibited. The Act, therefore, establishes a campaign reporting system designed to accomplish this purpose of disclosure.

Making Contributions in the Name of Another Person

Section 81002, subdivision (a) of the Act provides that "receipts and expenditures in election campaigns shall be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Timely and truthful disclosure of the source of campaign contributions is an essential part of the Act's mandate.

Section 84300, subdivision (a), states that no contribution of one hundred dollars (\$100) or more shall be made or received in cash. Section 84300, subdivision (c), states that no contribution of one hundred dollars (\$100) or more other than an in-kind contribution shall be made unless in the form of a written instrument containing the name of the donor and the name of the payee and drawn from the account of the donor or the intermediary, as defined in Section 84302.

Section 84301 provides that no contribution shall be made by any person in a name other than the name by which such person is identified for legal purposes.

Section 84302 provides that no person shall make a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing both the name of the intermediary and the contributor. (Section 84302; Regulation 18432.5.) Regulation 18432.5 states that a person is an intermediary for a contribution if the recipient of the contribution "would consider the person to be the contributor without the disclosure of the identity of the true source of the contribution."

SUMMARY OF THE EVIDENCE

COUNTS 1-3: Contributions Not Made Under Legal Name of the Donor

At all relevant times, a City of Cotati local ordinance imposed a \$350 contribution limit on campaign contributions made to candidates for elected office.

In an interview conducted by a Commission Investigator, Respondent admitted that about early August 2006, she received an envelope containing \$1,000 cash from George Barich to the Committee. Respondent stated that she knew accepting this contribution was illegal. In this interview, Respondent stated that Mr. Barich told her he wanted to get this money into the Committee somehow, but that he did not want his name attached to the money. Respondent then distributed this cash to three individuals, Adrienne Lauby, Tim Foley, and Robin Birdfeather, instructing them to contribute the money to the Committee in their own names. The contribution was reported on the campaign statement filed by the Committee on or about October 5, 2006, for the period August 11, 2006, through September 30, 2006, and was attributed to Adrienne Lauby, Tim Foley, and Robin Birdfeather in the amounts \$301, \$350 and \$350, respectively.

On November 17, 2009, the Committee filed an amendment to the statement covering the period of August 11, 2006, through September 30, 2006, which indicates that George Barich was the true source of the \$1,000 contribution, which had previously been attributed to Adrienne Lauby, Tim Foley, and Robin Birdfeather. Adrienne Lauby, Tim Foley, and Robin Birdfeather were named as intermediaries of this contribution on the amended campaign statement.

Respondent, acting as an intermediary or an agent, intentionally caused a campaign contribution to be made in the name of a person other than the true contributor, in violation of Sections 84301 and 84302.

CONCLUSION

This matter consists of 3 counts of violating the Act, which carry a maximum administrative penalty of five thousand dollars (\$5,000) per count for a total of fifteen thousand dollars (\$15,000).

In determining the appropriate penalty for a particular violation of the Act, the Enforcement Division considers the typical treatment of a violation in the overall statutory scheme of the Act, with an emphasis on serving the purposes and intent of the Act. Additionally, the Enforcement Division considers the facts and circumstances of the violation in context of the factors set forth in Regulation 18361.5, subdivision (d)(1)-(6): the seriousness of the violations; the presence or lack of intent to deceive the voting public; whether the violation was deliberate, negligent, or inadvertent; whether the Respondent demonstrated good faith in consulting with Commission staff; and whether there was a pattern of violations.

COUNTS 1-3: Contributions Not Made Under Legal Name of the Donor

Campaign money laundering is one of the most serious violations of the Act, as it denies the public of information about the true source of a candidate's financial support. Therefore, the typical administrative penalty in a campaign laundering case has historically been at or near the maximum penalty per violation, depending on the circumstances of the violation.

Aggravating Factors

Respondent intentionally directed three other contributors to violate the Act, concealed from the public knowledge of the true source of contributions, and violated local campaign contribution limits willfully. These are egregious violations of the Act.

Mitigating Factors

None.

Penalty

Accordingly, the facts of this case justify an imposition of the total administrative penalty of Fifteen Thousand Dollars (\$15,000).